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MR. JEFFERSON AND CHIEF JUSTICE MARSHALL.

Cohens v. Virginia—Marbury v. Madison.

[In Volume I of the South Carolina Historical and Genealogical Magazine (The Walker, Evans & Cogewell Co., Charleston, S. C.), pages 3-12, appears a letter from Thomas Jefferson to Judge William Johnson, of South Carolina, dated Monticello, June 12, 1823, in which the writer expresses in characteristic fashion his views of the two important decisions above named, and, incidentally his opinion of the judicial methods of his great political adversary, the judge who delivered the opinion of the court in each case. We have space only for what follows, but the entire letter is of deep interest to the student of constitutional law."¹—EDITOR VIRGINIA LAW REGISTER.]

. You request me confidentially to examine the question whether the Supreme court has advanced beyond it's constitutional limits, and trespassed on those of the State authorities? I do not undertake it, my dear Sir, because I am unable. age, and the wane of mind consequent on it have disqualified me from investigations so severe, and researches so laborious, and it is the less necessary in this case as having been already done by others with a logic and learning to which I could add nothing. on the decision of the case of *Cohens v. the State of Virginia*, in the Supreme court of the U. S. in March 21, Judge Roane, under the signature of Algernon Sidney, wrote for the Enquirer a series of papers on the law of that case. I considered these papers maturely as they came out, and confess they appeared to me to pulverise every word which had been delivered by Judge Marshall of the extrajudicial part of his opinion; and all was extrajudicial, except the decision that the act of Congress had not purported to give to the corporation of Washington the authority claimed by their lottery law of controuling the laws of the states within the states themselves. but, unable to claim that case, he could not let it go entirely, but went on gratuitously to prove that, notwithstanding the XIth amendment, of the constitution, a state *could* be brought, as a defendant, to the bar of this court. and, again, that Congress might authorise a corporation of it's territory to exercise legislation within a state, and paramount to the laws of that state. I cite the

¹ Judge Johnson was in 1804 appointed a Justice of the Supreme Court of the United States, at the age of thirty-two, and served in that capacity until his death, thirty years later.

sum and result only of his doctrines, according to the impression made on my mind, at the time, and still remaining. if not strictly accurate in circumstance, it is so in substance. this doctrine was so compleatly refuted by Roane, that if it can be answered I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us. and I mention this particular case, as one only of several, because it gave occasion to that thoro' examination of the constitutional limits between the General and state jurisdictions which you have asked for. there were two other writers in the same paper, under the signatures of Fletcher of Saltown, and Somers, who in a few essays presented some very luminous and striking views of the question. and there was a particular paper which recapitulated all the cases in which it was thought the federal court had usurped on the state jurisdictions. these essays will be found in the Enquirers of 21. from May 10. to July 13. it is not in my present power to send them to you; but if Ritchie can furnish them, I will procure and forward them. if they had been read in the other states, as they were here, I think they would have left, there as here. no dissentients from their doctrine. the subject was taken up by our legislature of 21-22. and two draughts of remonstrances were prepared and discussed. as well as I remember there was no difference of opinion as to the matter of right; but there was as to the expediency of a remonstrance at that time, the general mind of the states being then under extraordinary excitement by the Missouri question; and it was dropped on that consideration. but this case is not dead, it only sleepeth. the Indian chief said he did not go to war for every petty injury by himself; but put it in his pouch, and when that was full, he then made war. thank heaven we have provided a more peaceable and rational mode of redress.

This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly perhaps, because it in some measure, bore on myself. among the midnight appointments of mr Adams were commissions to some federal justices of the peace for Alexandria. these were signed and sealed by him, but not delivered. I found them on the table of the department of State, on my entry into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme court for a mandamus to the Secretary of state (mr Madison) to deliver the commission in-

tended for him. the court determined, at once, that, being an original process, they had no cognisance of it; and there the question before them was ended. but the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case. to-wit, that they should command the delivery. the object was clearly to instruct any other court having jurisdiction, what they should do, if Marbury should apply to them. besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? for if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. altho' signed and sealed, yet as long as it remains in the hands of the party himself, it is in fieri only, it is not a deed, and can be made so only by this delivery. in the hands of a third person it may be made an escrow; but whatever is in the executive offices is certainly deemed to be in the hands of the President, and in this case was actually in my hands, when I countermanded them because there was as yet no Secretary of state. yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on it's being merely an obiter dissertation of the Chief Justice.

It may be impracticable to lay down any general formula of words which shall decide at once, and with precision in every case, the limit of jurisdiction. but there are two Canons which will guide us safely in most of the cases. 1. the capital and leading object of the Constitution was to leave with the states all authorities which respected their own citizens only, and to transfer to the U. S. those which respected citizens of foreign, or other states; to make us several as to ourselves, but one as to all others. in the latter case then constructions should lean to the general jurisdiction; if the words will bear it; and in favor of the states in the former, if possible to be so construed. and indeed, between citizen and citizen of the same state, and under their own laws, I know but a single case in which a jurisdiction is given to the general government. that is where anything but gold or silver is made a lawful tender or the obligation of contracts is any otherwise impaired. the separate legislatures had so often abused that power, that the citizens themselves chose to trust it to the General, rather than to their own special authorities. 2. on every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying

what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was past. let us try Cohen's case by these Canons only, referring always however, for full argument, to the essays before cited.

1. it was between a citizen and his own state, and under a law of his state. It was a domestic case therefore, and not a foreign one.

2. can it be believed that under the jealousies prevailing against the powers of the General government, at the adoption of the constitution, the states meant to surrender the authority of preserving order enforcing moral duties, and restraining vice within their own territory? & this is the present case, that of Cohen being under the antient and general law against gaming? Can any good be effected by taking from the states the moral rule of their citizens, and subordinating it to the general authority, or to one of their corporations, which may justify forcing the meaning of words, hunting after possible constructions, and hanging inference on inference, from heaven to earth, like Jacob's ladder? such an intention was impossible, and such a licentiousness of construction and inference, if exercised by both governments, as may be done with equal right, would equally authorize both to claim all powers, general and particular, and break up the foundations of the Union. laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rule of common sense. their meaning is not to be sought for in metaphysical subtleties, which may make any thing mean every thing or nothing, at pleasure. it should be left to the sophisms of advocates, whose trade it is, to prove that a defendant is a plaintiff, altho' dragged into court, torto collo; that a power has been given, because it ought to have been given, et alia talia. the states supposed that by their 10th. amendment they had secured themselves against constructive powers. they were not lessoned yet by Cohen's case, nor aware of the slipperiness of the Eels of the law. I wish for no straining of words against the general government, nor yet against the states. I believe the states can best govern our home concerns, the general government our foreign ones. I wish therefore to see maintained that wholesome distribution of powers established by the constitution for the limitation of both: & never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market.

But the Chief Justice says 'there must be an ultimate Arbiter

somewhere.' true, there must: but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in Convention, and at the call of Congress, or of two thirds of the states. let them decide to which they meant to give an authority claimed by two of their organs. and it has been the peculiar wisdom & felicity of our constitution, to have provided this peaceable appeal where that of other nations is at once to force.

I rejoice in the example you set of seriatim opinions. I have heard it often noticed, & always with high approbation. some of your brethren will be encouraged to follow it occasionally; and in time it may be felt by all, as a duty, and the sound practice of the primitive court be again restored. why should not every judge be asked his opinion, and give it from the bench, if only by yea, or nay? besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it be impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority. the close of my second sheet warns me that it is time now to relieve you from this letter of unmerciful length. indeed I wonder how I have accomplished it, with two crippled wrists, the one scarcely able to move my pen, the other to hold my paper. but I am hurried sometimes beyond the sense of pain when unbosoming myself to friends who harmonise with me in principle. you and I may differ occasionally in details of minor consequence, as no two minds, more than two faces, are the same in every feature. but our general objects are the same, to preserve the republican form and principles of our constitution, and cleave to the salutary distribution of powers which that has established. these are the two sheet-anchors of our Union. if driven from either, we shall be in danger of foundering. to my prayers for it's safety and perpetuity, I add those for the continuation of your health, happiness and usefulness to our country.

TH: JEFFERSON.

Endorsed: Answered.